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Responsibility of States for internationally wrongful acts

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Comments and information received from Governments

Report of the Secretary-General

I. Introduction

1. The International Law Commission adopted the articles on responsibility of States for internationally wrongful acts ("State responsibility articles") at its fifty-third session, in 2001. In its resolution 56/83 of 12 December 2001, the General Assembly took note of the State responsibility articles adopted by the Commission, the text of which was annexed to that resolution, and commended them to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action.

2. In its resolutions 59/35 of 2 December 2004, 62/61 of 6 December 2007 and 65/19 of 6 December 2010, the General Assembly requested the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles. Following its consideration of the written comments received from Governments,[1] as well as the compilations of decisions prepared by the Secretary-General,[2] the Assembly, in its resolution 68/104 of 16 December 2013, continued to acknowledge the importance and usefulness of the State responsibility articles, and once again commended the articles to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. The Assembly reiterated its request that the Secretary-General invite Governments to submit their written comments on any future action regarding the articles and also requested the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles. In addition, the Assembly decided to further examine, at its seventy-first session, within the framework of a working group of the Sixth Committee and with a view to

* A/71/50.
[1] See A/62/63 and Add.1, A/65/96 and Add.1 and A/68/69 and Add.1.
[2] See A/62/62 and Corr.1 and Add.1, A/65/76 and A/68/72.

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taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

3. By notes verbales dated 10 January 2014 and 21 January 2015, the Secretary-General invited Governments to submit, no later than 1 February 2016, their written comments on any further action regarding the State responsibility articles. In those notes, he also invited Governments to submit information regarding decisions of international courts, tribunals and other bodies referring to the articles.

4. As at 8 April 2016, the Secretary-General had received written comments from Australia (dated 5 February 2016), Austria (dated 12 February 2016), the Czech Republic (dated 29 January 2016), El Salvador (dated 26 January 2016), Finland (dated 11 February 2016), Mexico (dated 15 March 2016), Portugal (29 January 2016) and the United Kingdom of Great Britain and Northern Ireland (dated 29 March 2016).[3]

II. Comments on any future action regarding the articles on responsibility of States for internationally wrongful acts

Australia

[Original: English]
[5 February 2016]

The articles on the responsibility of States for internationally wrongful acts are the product of over 50 years of work by the International Law Commission, which resulted in the articulation of one of the most complex and challenging areas in international law. The articles are proving their worth as a persuasive source of guidance for both Governments and courts, as demonstrated by the 2013 report of the Secretary-General on the responsibility of States for internationally wrongful acts[4] and more recent International Court of Justice jurisprudence.

We wish to reiterate the points that Australia made, on behalf of Australia, Canada and New Zealand, at the Sixth Committee discussion on the articles at the sixty-eighth session of the General Assembly in 2013.[5] The views that Australia expressed at that time are unchanged. Australia considers that the articles should not be negotiated among States with a view to turning them into a convention. We believe that the articles serve a useful purpose by guiding international bodies, as well as Governments, through their analysis of sensitive issues and their efforts to find resolutions under international law. Australia is keen to avoid a process through which the influence of the articles is diluted and the work of the International Law Commission in formulating the articles is undermined. In our view, it is more important to preserve the authority of the articles in practice than to codify them in a convention that may not achieve universality.

[3] Extracts from the comments by the United Kingdom of Great Britain and Northern Ireland, pertaining to the content of the State responsibility articles, will be made available, for the information of delegations, on the website of the Sixth Committee at the seventy-first session of the General Assembly (www.un.org/en/ga/sixth/).

[4] A/68/72.

[5] See A/C.6/68/SR.15, paras. 1-2.

Australia continues to support the adoption of a resolution endorsing the articles and attaching them as an annex. This approach would maintain the integrity of the articles and ensure that the excellent work of the International Law Commission is preserved.

Austria

[Original: English]
[12 February 2016]

Regarding the question of the legal form to be chosen for the result of the work of the International Law Commission on the subject of the responsibility of States for internationally wrongful acts, Austria, in principle, would be in favour of the adoption of a convention. However, the project of a convention should only be pursued if there are sufficient assurances that the current structure and balance of the draft articles will be maintained and a renewed discussion of their substantial provisions avoided and if there are realistic prospects for a wide ratification and acceptance of such a convention.

Austria believes that it is essential to get a clear picture of these issues in advance and is prepared to engage in discussions with interested States on the question of whether the conditions for future work on a convention exist.

Czech Republic

[Original: English]
[29 January 2016]

The written comments of the Czech Republic on further action regarding the articles were presented to the Secretary-General in a note verbale dated 31 January 2007.[6] Since that date, there have been no major developments requiring a change to this position. Consequently, the Secretary-General is referred to the position stated in the above-mentioned note.

El Salvador

[Original: Spanish]
[26 January 2016]

El Salvador recognizes the importance of the articles on the responsibility of States for internationally wrongful acts, which are the result of the arduous and methodical work of codification and progressive development undertaken by the International Law Commission, with the participation of important jurists and experts.

We believe that the content of these articles reflects the crystallization of the concept of State responsibility as a principle of international law and that the adoption of a binding instrument in this area will allow for safeguards and

[6] See A/62/63.

satisfactory outcomes, consistent with the rule of law, with respect to the commission of wrongful acts.

In this regard, we reaffirm[7] our support for the holding of an international conference aimed at drafting a convention on the responsibility of States for internationally wrongful acts, which will have more lasting and beneficial effects than can be achieved with non-binding instruments.

Finland

[Original: English]
[11 February 2016]

The Permanent Mission of Finland to the United Nations is pleased to submit the following on behalf of all the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden):

(a) The Nordic countries have, on several occasions, provided comments on the draft articles on State responsibility.[8] These articles have become the most authoritative statement available on questions of State responsibility. A growing body of jurisprudence refers to the articles as "established rules" or as an "expression of accepted principles" of international law;

(b) The Nordic countries continue to hold the view that the strongest possible position for the articles is to be included as an annex to a General Assembly resolution. Notwithstanding the fact that there are different views on specific details, the articles reflect a widely shared consensus. A diplomatic conference aimed at producing a convention might jeopardize the delicate balance built into the articles. For these reasons, the Nordic countries continue to believe that it would not be advisable at the present time to embark on negotiations for a convention on responsibility of States for internationally wrongful acts.

Mexico

[Original: Spanish]
[15 March 2016]

The history of the twentieth century has reflected the international effort to bring clarity to the law of international responsibility of both individuals and States. The development of the primary rules of the international legal order must be accompanied by a strengthening of the secondary rules, in particular given that the basis for determining the international responsibility of a State is an issue that cuts across all areas of international law.

Since the fifty-third session of the General Assembly,[9] Mexico has spoken in favour of the view that the outcome of the work of the International Law Commission on the responsibility of States for internationally wrongful acts should take the form of a legally binding instrument.

[7] See A/65/96/Add.1 and A/68/69.
[8] See A/62/63 and A/65/96.
[9] See, among others, A/C.6/56/SR.14, para. 20, A/C.6/59/SR.16, para. 17, and A/65/96.

The support of Mexico for this option has been reiterated on numerous occasions. As it maintained during the sixty-second session of the General Assembly,[10] when discussing the form that the articles should take, the codification of the rules on State responsibility remains an imperative for the international community.

The option of formulating a declaration on the basis of the Commission's articles would have the disadvantage of being considered "soft law", without binding force, and would not be able to offer the guarantees and certainties necessary to obtain redress for acts contrary to international law.

Mexico believes that, for the sake of legal certainty, the development of an international treaty based on the draft articles prepared by the Commission is feasible and desirable, bearing in mind that this process of codification would allow for a review by States and, to a lesser extent, would represent an exercise in crystallization or progressive development of the law regarding the weaknesses in the articles, which have been extensively studied and identified in the literature and by States themselves.

In its statements made during the sixty-eighth session of the General Assembly,[11] the Community of Latin American and Caribbean States (CELAC), of which Mexico is a member, spoke in favour of the establishment of a working group within the Sixth Committee as the most suitable means for achieving the possible drafting of a convention on the matter. CELAC also expressed its willingness to contribute to the discussion on this item.

Mexico believes that the future of the draft articles on State responsibility for internationally wrongful acts should continue to be analysed and discussed. Together with the delegations of the Czech Republic, Guatemala, Portugal and South Africa, Mexico has co-organized the three editions of the side event entitled "Responsibility of States: state of play and the way forward" to raise awareness of the process and to prepare for deciding on future action to be taken on the draft articles. These events have provided valuable forums for a discussion of the benefits and risks associated with the drafting of a treaty on the matter. While Mexico recognizes the various arguments and factors that could hinder consensus, excessive caution should not stand in the way of efforts to seek a broadly accepted agreement at a diplomatic conference.

After 50 years of work in the Commission and another 15 years since the Commission developed its draft articles on the responsibility of States for internationally wrongful acts, it has been found in State practice and the decisions of international tribunals that the articles contain the formulation of certain customary rules widely accepted by States. The existence of customary rules and principles related to the international responsibility of States is independent of their potential formulation in a convention. However, their codification in a legally binding instrument would provide clarity and legal certainty in this area.

In view of the foregoing, Mexico looks forward to the discussion of the item during the seventy-first session of the General Assembly, within the framework of a working group of the Sixth Committee, and "reaffirms its belief that the best way in which the State responsibility articles can help to achieve the aims set forth in

[10] See A/C.6/62/SR.12, paras. 80-83.
[11] See A/C.6/68/SR.15, para. 4.

Article 13, paragraph 1 (a), of the Charter of the United Nations — whose importance has been consistently reaffirmed by the General Assembly in the context of this topic — is through the adoption of a treaty".[12]

Portugal

[Original: English]
[29 January 2016]

It has been nearly 70 years since the International Law Commission decided to embark on what was certainly one of its most important projects. The topic has been maturing since 1949, when the Commission first selected the subject of State responsibility as being suitable for codification, together with the law of treaties and diplomatic relations. In 2013, the General Assembly decided again to include the topic in the provisional agenda of its seventy-first session and to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles on the matter,[13] of which the Assembly had taken note in 2001 and has discussed every three years since then.

The articles have thus undergone a long period of maturation, and Portugal feels that the time has come to seek agreement on a way forward and that the adoption of a convention, possibly through a diplomatic conference, could be the best way ahead. This was indeed the second stage that the Commission had recommended, in its report to the General Assembly in 2001,[14] in the light of the importance of the topic. This path is also the one that honours best the work of the Commission and of its Special Rapporteurs, while conferring upon States a leading role in international law-making processes on such a crucial legal domain.

It is, however, important to be able to take an informed decision, at the seventy-first session of the General Assembly, on the possibility of opening negotiations on a convention on State responsibility. Past discussions in the Sixth Committee and written comments by Governments, as well several recently organized informal panels, have helped to identify points in common and of divergence among Member States. Portugal recognizes that Member States have different views as to the future of the articles, which range from supporting a convention to merely adopting the articles in a General Assembly resolution or to keeping the status quo.

Given that Portugal has already had the opportunity to state before the Sixth Committee[15] and in its previous written comments on the matter in 2007, 2010 and 2013,[16] it continues to believe that this is an area of international law that deserves to be incorporated into a legal instrument that will certainly contribute in a decisive manner to respect for international law and to peace and stability in international

[12] See A/65/96.
[13] See resolution 68/104.
[14] See A/53/10, in *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), para. 73.
[15] A/C.6/56/SR.14, para. 68, A/C.6/59/SR.15, paras. 73-74, A/C.6/62/SR.12, para. 70, A/C.6/65/SR.15, paras. 9-10, and A/C.6/68/SR.15, para. 12.
[16] See note 1 above.

relations. States must not be overcautious about moving forward in this area, given that the only concern is to establish the consequences of the international wrongful acts and not to provide a definition of the wrongful act itself. State responsibility pertains only to the secondary rules and not the primary rules that define the obligations of States. If one wants convincing evidence for the opportunity and fundamental need to proceed in this field, then one only has to turn to State practice and to the decisions of international courts and tribunals, including the case law of the International Court of Justice.

The various reports prepared by the Secretary-General containing a compilation of decisions of international courts, tribunals and other bodies[17] clearly illustrate this. Furthermore, it would be senseless not to proceed in the development and codification of this matter and to continue to proceed in others, such as diplomatic protection, liability and responsibility of international organizations, when the main principles that guide the development of these latter subjects are the same that apply to State responsibility.

Therefore, Portugal considers that the articles on responsibility of States for international wrongful acts should be adopted as a binding international convention. We remain open to discussing possible intermediary steps, such as a preparatory committee in order to better identify the points of agreement and disagreement and move towards establishing a diplomatic conference for the drafting of a convention on safe ground and on the basis of the current articles.

United Kingdom of Great Britain and Northern Ireland

[Original: English]
[29 March 2016]

The United Kingdom considers the draft articles on the responsibility of States for internationally wrongful acts to be one of the most significant projects that the International Law Commission has produced in recent years. Aspects of the draft articles continue to be highly influential, as evidenced by the judgments of international and national courts and tribunals that make reference to them and the recourse that Governments have to them in formulating their legal views. However, the very breadth of the draft articles, both in terms of their scope and formulation, means that it is still premature to say that they reflect in their entirety customary international law or a settled consensus of views among States. There remain elements of uncertainty and disagreement. As the United Kingdom has said on previous occasions before the Sixth Committee,[18] during the process through which the draft articles are further engrained and the practice of States becomes more settled, there are dangers in pressing ahead towards a convention. Such a course would risk provoking divergences and differences of views and thereby threaten the very coherence that the draft articles are seeking to instil. At the present time, the United Kingdom does not consider that any action should be taken to adopt or formalize the articles. Furthermore, the United Kingdom does not consider any further action from the General Assembly to be necessary at the present time, given that resolution 56/83 annexing the draft articles welcomed the Commission's work

[17] See note 2, above.
[18] A/C.6/56/SR.11, para. 23, A/C.6/59/SR.15, para. 70, A/C 6/62/SR.13, para. 16, A/C.6/65/SR.15, para. 11, and A/C.6/68/SR.16, paras. 23-24.

on them, took note of them and commended them to the attention of Governments. We are most grateful to the Commission for producing such significant work, but in the light of the evolving use and practice of States in relation to the draft articles, the United Kingdom does not consider further action to be necessary at the present time.

III. Information on State practice regarding the articles on responsibility of States for internationally wrongful acts

Czech Republic

[Original: English]
[29 January 2016]

The Czech Republic has at its disposal three published arbitral awards referring to the articles:

(a) The partial award on *European Media Ventures S.A. vs. the Czech Republic*, issued on 8 July 2009;

(b) The final award on *InterTrade Holding GmbH vs. the Czech Republic*, issued on 29 May 2012;

(c) The final award on *ECE Projektmanagement International GmbH vs. the Czech Republic*, issued on 19 September 2013.

The articles were discussed in connection with the attribution of acts to the State.

United Kingdom of Great Britain and Northern Ireland

[Original: English]
[29 March 2016]

Concerning the request for information on State practice regarding the articles on responsibility of States for internationally wrongful acts, the following are extracts from three cases before the courts of the United Kingdom in which the articles were referenced:

R. (on the application of Al-Saadoon) v Secretary of State for Defence [2015] EWHC 715 (Admin)

"191.The need to ensure that those who are complicit in torture are held criminally responsible is reflected in article 4 of [the United Nations Convention against Torture], which states:

'1. Each State party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State party shall make these offences punishable by appropriate penalties which take into account their grave nature.'

192. The question then arises of what amounts to 'complicity' for these purposes. A natural place to look for a principle on which responsibility may be based is article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission on 9 August 2001 (the "ILC Draft Articles")[, on "Aid or assistance in the commission of an internationally wrongful act"] 193. In Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [the International Court of Justice referred to] article 16 of the ILC Draft Articles when discussing what constituted complicity in genocide, and affirmed its status as customary international law.

194. In principle it seems to me that transferring a person into the custody of another State, if done with knowledge of the relevant circumstances, could amount to assistance giving rise to responsibility in accordance with article 16 for complicity in acts of torture or other serious mistreatment by the receiving State.

195. An argument might be made that article 16 of the ILC Draft Articles is only applicable if the receiving state is also a party to the [European Convention for the Protection of Human Rights and Fundamental Freedoms] so that the act committed by the receiving State is itself a violation of article 3 of the Convention. However, I think that such an approach would be unduly narrow. The relevant focus is on the conduct of the transferring State and on identifying when that State may be held to have violated article 3. It cannot matter for this purpose whether or not the receiving State which perpetrates the treatment is also a member of the Council of Europe and has undertaken an international obligation to respect article 3. The wrongfulness of assisting in torture is the same irrespective of whether the party which actually inflicts the torture is subject to the same legal regime. Complicity need not involve joint liability.

196. An alternative approach to relying on article 16 of the ILC Draft Articles, which avoids any problem about whether as a matter of construction article 16 applies, would be to fashion a similar principle of responsibility for complicity in torture or other prohibited treatment by interpretation of article 3 of the Convention itself."

R. (on the application of Western Sahara Campaign UK) v Revenue and Customs Commissioners [2015] EWHC 2898 (Admin)

"49. Fifthly, the non-State nature of the commercial companies who made exploration agreements with Morocco meant no consideration was given to the status of the International Law Commission's 2001 Document on the Responsibility of States for Internationally Wrongful Acts (see Ch.III arts 40-41 and the duty on States to cooperate to end serious breaches of a peremptory norm of international law). If such an obligation is now part of customary international law, it is possible that a failure by an administering power to promote self-determination will be considered such a serious breach. Equally, the fact that trade agreements are made that benefit the population of the occupied territory generally without regard to the fact that some of the population are said to be present in the territory as a result of the original unlawful act may be evidence of a serious breach of international law."

Rahmatullah v Ministry of Defence [2014] EWHC 3846 (QB)

> **"63. Even if the immunity afforded to officials of the State is analysed in terms of 'indirect impleading', this does not assist the defendants. Jones v Saudi Arabia demonstrates that State immunity extends to agents of the State whose acts are attributable to it. The House of Lords located the relevant rules of attribution in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts promulgated by the International Law Commission: see [2007] 1 AC 270, 281–2, para 12. The manner in which the State's interests would be affected by a judgment against the defendant is therefore that the judgment would be against a person for whose conduct the State is liable under international law. By contrast, in the present case it is not and could not be suggested that the wrongful acts allegedly done by British officials were done on behalf of the United States of America or are attributable to the United States. The defendants are not agents of the United States but of a different sovereign state, the United Kingdom. It is therefore nothing to the point that the immunity of the United States would apply to an action brought against any of its own officials."**